United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

w/affidavit

75-4171

To be argued by
MARY P. MAGUIRE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-4171

GIUSEPPE MARINO,

Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,
UNITED STATES DEPARTMENT OF JUSTICE,

Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE
BOARD OF IMMIGRATION APPEALS

BRIEF FOR THE RESPONDENT

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Statement of the Case

Pursuant to Section 106(a) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1105a(a), Giuseppe Marino (hereinafter "Marino" or the "petitioner") petitions this Court for review of a final order of deportation entered by the Board of Immigration Appeals (the "Board") on April 30, 1975. That order dismissed Marino's appeal from an order of an Immigration Judge which found Marino deportable under Section 241(a)(2) of the Act, 8 U.S.C. § 1251(a)(2), denied his application for adjustment of status under Section 245 of the Act, 8 U.S.C. § 1255 and granted him the privilege of voluntary departure. Marino contends that the Board's order should be reversed because the Board erred in holding that Marino is an excludable alien in view of his 1962 conviction in Italy for violation of Article 642 of the Italian Penal Code, and, therefore, not eligible to adjust his status pursuant to Section 245 of the Act.

Issue Presented

Whether petitioner's conviction for violation of Article 642 of the Italian Penal Code renders him excludable from the United States under Section 212(a)(9) of the Act, 8 U.S.C. § 1182(a)(9).

Statement of the Facts

Petitioner Giuseppe Marino is a fifty year old alien, a native and citizen of Italy. On December 6, 1972 Marino was convicted under Article 642 of the Italian Penal Code of fraudulent destruction of his own property. He was sentenced to six months in prison and ordered to pay a fine of 100,000 lire (which at that time was the equivalent of $160); execution of the sentence was suspended for five years (T. 27).* An appeal was taken by Marino but the Italian Court deemed it unnecessary to proceed with the appeal since Marino's conviction was declared extinguished by reason of a presidential decree of amnesty (T. 27).

In September 1971 Marino applied for a nonimmigrant visa, was found ineligible for such visa on account of the 1962 conviction and applied for and received a waiver of inadmissibility. On October 4, 1971 Marino was admitted to the United States as a nonimmigrant visitor for pleasure authorized to remain until November 3, 1971. Marino was subsequently granted an extension of his temporary stay until January 3, 1972. On February 14, 1972 the Immigration and Naturalization Service (the "Service") approved a visa petition filed by Marino's United States citizen sister on his behalf which classified Marino as a fifth-preference alien for issuance of an immigrant visa.

* References preceded by the letter "T." refer to tabs affixed to the Certified Administrative Record filed with the Court.

Deportation proceedings were instituted against Marino on May 22, 1972 by the issuance of an order to show cause and notice of hearing (T. 30). At a deportation hearing held on May 31, 1972 Marino conceded his deportability as an overstay visitor and applied for and was granted the privilege of voluntary departure pursuant to Section 244(e) of the Act, 8 U.S.C. § 1254(e). The Immigration Judge also entered an alternate order of deportation to Italy in the event Marino failed to depart voluntarily (T. 29).

By motion dated July 11, 1972 Marino sought to reopen his deportation proceedings in order to apply for adjustment of status pursuant to Section 245 of the Act, 8 U.S.C. § 1255. The motion to reopen was granted by the Immigration Judge and reopened deportation hearings were conducted on December 19, 1972 and January 30, 1973 with respect to Marino's application for adjustment of status. In ruling on Marino's application, the Immigration Judge was confronted with Marino's conviction record. In a decision dated February 9, 1973 the Immigration Judge found Marino deportable as charged, *i.e.*, an alien who after admission as a nonimmigrant remained in the United States for a longer time than permitted. The Immigration Judge further found Marino to be statutorily ineligible for adjustment of status since he is inadmissible to the United States under Section 212(a)(9) of the Act as an "alien . . . convicted of a crime involving moral turpitude. . . ." (T. 14).

Marino appealed the Immigration Judge's decision to the Board of Immigration Appeals. In a decision and order dated April 30, 1975 the Board dismissed the appeal and held that Marino had not sustained his burden to establish that he is eligible for adjustment of status under Section 245 of the Act. In reaching that conclusion the Board found: (1) that Marino's conviction was

final for immigration purposes; (2) that the crime for which Marino was convicted should be classified as a felony; and (3) that the petty offense exception to Section 212(a)(9) of the Act, 8 U.S.C. § 1182(a)(9) is not available to Marino (T. 3).

This petition for review was filed on August 13, 1975 and Marino's deportation stayed pursuant to Section 106(a)(3) of the Act, 8 U.S.C. § 1105a(a)(3).

Relevant Statutes

Immigration and Nationality Act, Section 212 (8 U.S.C. § 1182).

> Sec. 212. (a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> * * * * *
>
> (9) Aliens who have been convicted of a crime involving moral turpitude (other than a purely political offense). . . . Any alien who would be excludable because of the conviction of a misdemeanor classifiable as a petty offense under the provisions of Section 1(3) of Title 18, United States Code, by reason of the punishment actually imposed, or who would be excludable as one who admits the commission of an offense that is classifiable as a misdemeanor under the provisions of section 1(2) of title 18, United States Code, by reason of the punishment which might have been imposed upon him, may be granted a visa and admitted to the United States if otherwise admissible: *Provided*, that the alien has committed only one such offense, or admits the commission of acts which constitute the essential elements of only one such offense.
>
> * * * * *

Immigration and Nationality Act, Section 245 (8 U.S.C. § 1255):

> Sec. 245. (a) The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved.
>
> * * * * *

Title 18, United States Code (U.S.C.), as amended:

> § 1. Offenses Classified.
>
> Notwithstanding any Act of Congress to the contrary:
>
> (1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.
>
> (2) Any other offense is a misdemeanor . . .
>
> (3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense.

District of Columbia Code

> Sec. 22-402. Burning one's own property with intent to defraud or injure another.

Whoever maliciously burns or sets fire to any dwelling, shop, barn, stable, store or warehouse or other building, or any steamboat, vessel, canal boat, or other watercraft, or any goods, wares or merchandise, the same being his own property, in whole or in part, with intent to defraud or injure any other person, shall be imprisoned for not more than fifteen years.

Italian Penal Code, Article 642

Fraudulent destruction of one's own property and fraudulent mutilation of one's own body.

Whoever, for the purpose of gaining for himself or others the premium of an insurance against accidents, destroys, disperses, deteriorates or hides objects of his own property, is punished with prison of six months to three years and with a fine up to 400 thousand lire.

* * * * *

ARGUMENT

Petitioner's conviction for violation of Article 642 of the Italian Penal Code renders him inadmissible to the United States and thus ineligible to adjust his status pursuant to Section 245 of the Act.

A. Adjustment of status pursuant to Section 245 of the Act, 8 U.S.C. § 1255.

Section 245 of the Act, 8 U.S.C. § 1255, provides that the Attorney General, in his discretion, may adjust the status of an alien to that of a permanent resident provided the alien is eligible to receive an immigrant visa, is admissible to the United States and provided an immigrant visa is immediately available. Because this form of relief circumvents the usual immigration procedures, it is considered extraordinary and will be granted only in meritorious cases. *Chen* v. *Foley*, 385 F.2d 929 (6th Cir. 1967), *cert. denied*, 393 U.S. 838 (1968).

In order for an alien to be eligible for consideration, he must first satisfy the substantive prerequisites contained in the statute. Having done so, he must then persuade the Attorney General to exercise his discretion favorably. Of course, if the alien fails to satisfy the statutory requirements, he will be ineligible for the relief sought and hence the exercise of discretion will never be reached. *Diric* v. *Immigration and Naturalization Service*, 400 F.2d 658 (9th Cir. 1968), *cert. denied*, 394 U.S. 1015 (1969); *Tibke* v. *Immigration and Naturalization Service*, 335 F.2d 42 (2d Cir. 1964); *Gambino* v. *Immigration and Naturalization Service*, 419 F.2d 1355 (2d Cir. 1970), *cert. denied*, 399 U.S. 905; *Talonoa* v. *Immigration and Naturalization Service*, 397 F.2d 196 (9th Cir. 1968); *Ambra* v. *Ahrens*, 325 F.2d 468 (5th Cir. 1963). Moreover, the burden is always

upon the alien to establish that he is statutorily eligible for this relief and that his application merits the favorable exercise of discretion. *Santos* v. *Immigration and Naturalization Service*, 335 F.2d 262 (9th Cir. 1967).

Having examined the nature of the relief sought herein, we now turn to consider the evidence contained in the administrative record upon which the Board's decision was based.

B. Petitioner's conviction renders him ineligible for an immigrant visa.

In order to be eligible for status adjustment, an alien must be eligible to receive a visa and must be admissible to the United States. The petitioner cannot satisfy this requirement. The record establishes that in 1962 he was convicted of a violation of Article 642 of the Italian Penal Code for fraudulent destruction of his property. It has consistently been held that, in evaluating crimes against property, moral turpitude attaches to any crime involving fraud. *Sollazze* v. *Esperdy*, 285 F.2d 341 (2d Cir. 1961); *Burr* v. *INS*, 350 F.2d 87 (9th Cir. 1965), *cert. denied*, 383 U.S. 915 (1966). Section 212(a)(9) of the Act, 8 U.S.C. § 1182(a)(9), provides that an alien who has been convicted of a crime involving moral turpitude is ineligible to receive a visa and shall be excluded from admission to the United States.

Petitioner contends, however, that he is eligible for admission to the United States, despite his conviction, by virtue of the "petty offense" exception to Section 212(a)(9) of the Act. Section 212(a)(9) provides that "any alien who would be excludable because of the conviction of a misdemeanor classifiable as a petty offense under the provisions of Section 1(3) of Title 18, United States Code, by reason of the punishment actually im-

posed . . . may be granted a visa and admitted to the United States if otherwise admissible. . . ." In order to determine, therefore, whether the petty offense exception of Section 212(a)(9) is available to Marino, the conviction must be examined to see if it qualifies as a petty offense. Section 1(3) of Title 18, United States Code, defines a petty offense as "any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both . . ." Thus, in order to qualify as a petty offense, the crime must be a misdemeanor.

Since the Italian Penal Code does not distinguish between felonies and misdemeanors, it is necessary to look to the equivalent offense under the United States law to determine whether the foreign offense shall be considered a misdemeanor classifiable as a petty offense under Section 212(a)(9). Difficulties encountered in assessing foreign crimes have been resolved by an administrative ruling that they will be evaluated under the law of the United States, and that their classification as a felony or misdemeanor will be determined in the light of the maximum punishment imposable for an equivalent crime described in Title 18 of the United States Code, or, if the equivalent offense is not found there, in Title 22 of the District of Columbia Code. *Matter of T*, 6 I. & N. Dec. 508, 517 (1955); *Giammario* v. *Hurney*, 311 F.2d 285 (3d Cir. 1962).

There is no crime equivalent to Article 642 in Title 18 of the United States Code. The Board found, however, that Section 22-402 of the District of Columbia Code is the provision most nearly equivalent to the Italian statute under which the petitioner was convicted. The crime defined in Section 22-402 is clearly a felony since it carries a maximum penalty of 15 years imprisonment. Petitioner contends that Section 22-402 is not equivalent to Article 642 of the Italian Penal Code since Section

22-402 is an arson statute and refers only to the malicious burning of one's own property. It is submitted that an examination of the Italian statute under which Marino was convicted clearly demonstrates the comparability of Section 22-402 with Article 642 and that it is not the descriptive phrase, such as arson, used to describe the crime but rather the elements of the crime which must be looked to as a basis of comparison. Both statutes contain the following common elements: (1) a wilful act which results in the destruction or deterioration of property; (2) the property which the accused is charged with destroying or burning is "his own property"; and (3) the accused is motivated by an intent to defraud.

Petitioner contends that Section 22-402 is not applicable because the property which he was charged with burning was not his property but was merely rented by him. It is well-settled, however, that the record of conviction is conclusive with respect to the conviction. See *Rassano* v. *Immigration and Naturalization Service*, 377 F.2d 971 (7th Cir. 1966), *vacated and remanded on other grounds*, 377 F.2d 975. Thus, the record of conviction establishes that petitioner was convicted of a violation of Article 642 of the Italian Penal Code which relates to the "fraudulent destruction of one's own property".

Petitioner contends that Section 22-403 of the District of Columbia Code is the statute most nearly equivalent to the Italian statute. Even if petitioner's contention is upheld, however, the petty offense exception would still not be available to him. Section 22-403 contains both felony and misdemeanor classifications and petitioner relies on that portion of Section 22-403 which states that "if the value of the property be less than $200. [the defendant] shall be fined not more than $1,000 or imprisoned for not more than one year, or both." The record clearly establishes, however, that the value of the

property destroyed by Marino exceeded $200. The record of conviction shows that the value of the damaged property was approximately 150,000 lires, the equivalent of $240 at that time. Thus, even if Section 22-403 were found to be more nearly equivalent to the Italian statute than Section 22-402 relied upon by the Board, the crime for which Marino was convicted would still constitute a felony and the petty offense exception of Section 212(9) would not be available to Marino.

C. Petitioner's conviction is a final conviction within the meaning of the Act.

Petitioner contends that his conviction in Italy, from which he appealed, is not a final judgment sufficient to sustain a finding that he is ineligible for adjustment of status since he received a presidential amnesty before his appeal could be determined. A review of the record establishes that petitioner's appeal was from the sentence imposed rather than from the determination of guilt or innocence of the crime. This distinction is clearly recognized under Italian law. See *Matter of G*, 5 I. & N. Dec. 129; *Matter of B*, 7 I. & N. Dec. 166. Even if an appeal as to an excessive amount of fine imposed had been sustained, and the punishment mitigated, petitioner would still have remained guilty of the offense and hence excludable and inadmissible.

Marino was convicted in a foreign court and he relies upon a foreign statute to remove the effects of that conviction. He can take no comfort from these facts, however. It is well-settled that a foreign pardon or amnesty is ineffective to prevent deportation or exclusion. *Consola* v. *Karnuth*, 108 F.2d 178 (2d Cir. 1939); *Palermo* v. *Smith*, 17 F.2d 534 (2d Cir. 1927); *Sohaiby* v. *Savoretti*, 195 F.2d 139 (5th Cir. 1952); *Mercer* v. *Lence*, 96 F.2d 122 (10th Cir. 1938), *cert.*

denied, 305 U.S. 611; *Weedin* v. *Hempel*, 28 F.2d 603 (9th Cir. 1928). Marino was convicted after trial and has never been relieved of the conviction for immigration purposes. Neither the conviction itself nor the appeal may now be retried on the merits.

In any event, the conviction is not the basis for the deportation order, as in *Will* v. *INS*, 447 F.2d 529 (7th Cir. 1971). Petitioner is deportable as an overstay visitor—which he concededly is. The conviction is relevant only to petitioner's application for adjustment of status. In this he bears the burden of proving that he both qualifies and merits the relief. It is submitted that Marino has not sustained that burden and that the Board properly found him excludable from the United States and thus ineligible for adjustment of status.

CONCLUSION

The petition for review should be dismissed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

CA 75-4171

State of New York)
County of New York) ss

Pauline P. Troia being duly sworn, deposes and says that She is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 4th day of February, 19 76 She served ~~a~~ 2 copy of the within Govt. printed brief

by placing the same in a properly postpaid franked envelope addressed:

Thomas A. Church, Esq.
94 Bayard St.
Ny Ny 10013

And deponent further says She sealed the said envelope and placed the same in the mail ~~chute~~ drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Sworn to before me this
4th day of February, 1976

Ralph I. Lee

RALPH I. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1977